83-1081

NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RODGER C. FINVOLD
ELISE R. FINVOLD
Appellants,

v.

JAMES M. SAMBS, et al.,
Appellees.

ON APPEAL FROM THE CALIFORNIA
FOURTH APPELLATE DISTRICT COURT,
DIVISION ONE

JURISDICTIONAL STATEMENT

RODGER C. FINVOLD*
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December 27, 1983

QUESTIONS PRESENTED

1. Whether or not the California Code of Civil Procedure (CCP) § 340.5 is repugnant to the Constitution of the United States Seventh Amendment preservation of civil "right to trial by jury, in that the term,

"should have discovered,"

is so vague and yet all inclusive that defendants and judges are free to assume virtually limitless knowledge and expertise on the part of the plaintiff. This thus allows triggering of the statute of limitations prior to any factual discovery on mere suspicion rather than true discovery when ruling on a demurrer and still comply with the letter (but not the spirit) of the law since this places no limit on the knowledge that may be assumed for the plaintiff.

2. Whether or not the laws, or the interpretation of the laws, in the state

of California are repugnant to the Fourteenth Amendment to the Constitution of The United States, Section 1, infra, in that no cause of action may be successfully brought against a psychiatrist, except sexual abuse, thereby allowing psychiatrists freedom to perform gross malpractice and mentally harass psychiatric patients at will with impunity and immunity from prosecution or reponsibility.

PARTIES BELOW

There are no other parties to the action in the Courts below except Does I through X, other than those listed in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	4
STATEMENT OF THE CASE	8
THE QUESTIONS ARE SUBSTANTIAL	35
CONCLUSIONS	36
APPENDIX A	1a
APPENDIX B	3a
APPENDIX C	16a
APPENDIX D	25a
APPENDIX E	28a
APPENDIX F	29a
APPENDIX G	30a

TABLE OF AUTHORITIES

Pages

CASES

Depenbrok v. Kaiser Foundation Health Plan, 79 Cal.Rptr. 724, 726 — 13, 16

Gruenber v. Aetna Insurance Company, 9 Cal.3d 566, 575 (1973) — 8, 21

Harvey v. Holtville, 271 Cal. App.2d 816 (1969) — 21

Kane v. Cook, 8 Cal., p.449 — 5, 33

Morgan v. Asher 193 p.288, 49 C.A. 172 (1920) — 8, 21

Stoney Creek Orchards v. State 12 Cal. App.3d 903 (1970)

Ware v. Dunn, 80 Cal.2d 936, 183 P2d 128 — 28

CONSTITUTUIONAL PROVISIONS

United States Constitution, Amendments, Article VII — ii, 4, 35, 36, 39

United States Constitution, Amendments, Article XIV, Section 1 — ii, 4, 36, 39

STATUTES

California Codes

Code, § 43 — 5

Code of Civil Procedure § 312 — 6, 9, 17, 33

Code of Civil Procedure § 337 5

Code of Civil Procedure § 340.5 5, 7, 23, 24

Code of Civil Procedure § 430.1 4

Penal Code 5

United States Codes

28 U.S.C. § 2403(b) 7

Books

Black's Law Dictionary 23

22 Cal Jur 2d 27

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No._____

RODGER C. FINVOLD
ELISE R. FINVOLD,
Appellants,

v.

DR. JAMES M. SAMBS
JAMES M. SAMBS, M.D., INC., et al.,
Apellees.

ON APPEAL FROM THE CALIFORNIA FOURTH APPELLATE DISTRICT COURT, DIVISION ONE

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Supreme Court of California did not issue an opinion. Its denials of Appellants' Petition for Hearing and Petition for Reconsideration On Constitutional Grounds appear in the appendix, App. A, infra.

The opinion of the three-judge California Court of Appeals, stipulated, "Not to be published in official reports," appears in App. B, infra.

The transcript of the hearing and resultant opinion of Judge Butler in the California Superior Court for the County of San Diego is copied as App. D, infra.

The denial of the Appellate Court for a rehearing to clarify misunderstandings is included as App. E, infra.

The Appellate Court's denial of Appellants' Petition for Reconsideration On Constitutional Grounds is included as App. F, infra.

JURISDICTION

Appellants filed notice of appeal on the instant case December 1, 1981 and the Opening Brief in the California Fourth District Appellate Court September 10, 1982 against an "Order Sustaining General Demurrer To First Amended Complaint Without Leave To Ammend..." by Judge Butler of the California Superior Court for San Diego County, filed November 10, 1981, App. D, infra, alleging:

> "...that the said cause of action fails to state facts sufficient to constitute a cause of action in that it is barred by the statute of limitations."

The Appellate Court affirmed the trial court in an opinion filed March 24, 1983, App. B, infra.

Appellants Petition for Rehearing to clarify misunderstandings in Appellate Court's Opinion, filed April 11, 1983 was denied April 11, 1983, App. E, infra.

Appellants' Appeal for Hearing in California Supreme Court, filed May 6, 1983, denied June 15, 1983, App. A, infra.

Appellants Petition for Reconsideration On Constitutional Grounds in the Appellate Court, filed June 26, 1983 was denied August 16, 1983, App. F, infra.

Appellants' Appeal for Reconsideration On Constitutional Grounds filed in California Supreme Court September 16, 1983, denied October 5, 1983, App. A, infra.

Appellants' Notice of Appeal, filed December 29, 1983, App. G, infra.

The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendments Article VII

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved (emphasis added)..."

United States Constitution, Amendments Article XIV

> "Section 1. ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law (emphasis added); nor deny to any person within its jurisdiction the equal protection of the laws."

California CCP § 430.1 Objection by defendant; grounds

> "The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30 to the pleading on any one or more of the following grounds:
> ...
>
> "(f) The pleading does not state facts sufficient to constitute a cause of action."

California CCP § 337. Four years; written contract; exception; ...

> "Within four years: An action upon any contract, obligation or liability founded (emphasis added) upon an instrument in writing,..."

California CCP § 340.5 Action against health care provider; three years from injury or one year from discovery; exceptions; minors

> "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered (emphases added), the injury, whichever comes first. ..."

California Code § 43. General personal rights

> "Besides the personal rights mentioned or recognized in the Government Code, every person has, subject to qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

California Penal Code § 236. Definition

> FALSE IMPRISONMENT DEFINED. False imprisonment is the unlawful violation of the personal liberty of another.

California CCP § 312. General limitations; special cases

"Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases (emphasis added), a different limitation is prescribed by statute.

"Code Commissioners' Notes

"4. Fraudulent Concealment.--Statutes of limitation are passed to the production of stale claims when, from the lapse of time, it has become difficult or impossible to furnish the requisite proof to defeat them. ...They are not intended to protect a party who has, by fraudulent concealment, delayed the assertion of a right against him until after the expiration of the period limited by the statute (emphasis added). ... 'In this diversity of opinion,' say the court, 'we are free to adopt the rule which will best tend to advance justice and prevent the perpetration of fraud, and we, therefore, hold that in all cases a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the Statute of Limitations. By the system of practice in this State there is no replication to the answer. The fraudulent concealment cannot, therefore, be replied to by pleading, but it may be established by proof on the trial, and will then just as effectually avoid the plea of the statute.' Kane vs. Cook, 8 Cal., p. 449."

Inasmuch as the Constitutionality of California Code of Civil Procedure § 340.5 is called into question herein and neither the State nor any agency, officer, or employee thereof is a party to the instant action, 28 U.S.C. § 2403 (b) may be applicable. Therefore a copy of this Jurisdictional Statement will be served on the Attorney General of California.

STATEMENT OF THE CASE

The issue in this case is simple, namely: Should the appellees' Demurrer be sustained or denied? It should be noted that this is the only question before the courts below and that both courts continuously attempted to "try the case" in defiance of precedence quoted by Appellees in their Demurrer to First Amended Complaint, Memorandum of Points And Authorities, C.T. 57, 58:

> "Generally, material facts alleged in a complaint are treated as true for purposes of ruling on a demurrer. Gruenberg v. Aetna Insurance Company, 9 Cal.3d 556 (sic) (corrected by Appellants to 566), 575 (1973. ...Further, allegations that are contradicted by facts (emphasis added) of which the court may take judicial notice may be disregarded. Stoney Creek Orchards v. State, 12 Cal.App.3d 903 (1970)."

While the issue is simple, the facts and application of the relevant law and precedence appear to Appellants to be be beyond the comprehension of the courts below with respect to the appli-

cation of the

> "...rule which will best tend to advance justice and prevent the perpetration of fraud..." California CCP § 312, Code Commissioners' Notes, supra.

There is no evidence that Judge Butler considered, or even read Plaintiffs'/Appellants' Points And Authorities in rebuttal to Defendants'/Appellees' Points And Authorities. Furthermore, Judge Butler delivered his final opinion and ruling without even mentioning, much less considering, one of the three main causes of action, namely that of False Imprisonment. There was no comment or explanation as to why Appellants' rebuttal to Appellees' Points And Authorities were unsatisfactory; particularly why Appellants' discovery date of subsequent to April 8, 1980 was not factual whereas Judge Butler's assertion:

> "...that you were aware that the alleged medical malpractice occurred in the years immediately following the first consultation..." Reporter's Transcript, p. 1 lines 18-20,

constituted discovery "fact." Aware that something is amiss is not discovery of the malpractice, especially in light of the admonishment from the appellees during treatment:

> "When you've had as much training, experience and knowledge as I have, then you may question my judgment."

The only justification for Judge Butler's opinion and ruling is the "should have known" phrase in California CCP § 340.5, ignoring the qualifier, "reasonable diligence" and that laymen are not expected to know more than the expert--that's why they hire an expert.

The Appellate Court completely misconstrued the wording, meaning and intent of the Contract to the detriment of the appellants. The "Contract" was the appellees' own "Consent Form"--for treatment--modified into a "Non-Consent Form" to reflect the understanding of the parties concerned, i.e.: (1) No

treatment and (2) Contacts limited to those necessary to provide an opinion for the pending court hearing.

As such the "disclaimer" which applies to "treatment" does not apply. One cannot make an agreement and then say, "But don't hold me responsible if I don't keep my agreement." This is not a children's game of King's X!

The intent and understanding of the parties concerned at the time of the Contract comes through loud and clear, which doesn't have to be written, but per California CCP § 337 supra,

"founded upon a written instument" extends the statute of limitations to four years rather than two.

There was a Contract. It was breached. It is not the purpose of the courts in a hearing on a Demurrer to try the case.

This suit was brought to obtain redress for the damages caused by the

irresponsible, irrational, fraudulent and illegal actions of the appellees.

The Complaint contained three major causes of action: (1) Breach of Contract And Damages, (2) False Imprisonment, and (3) Fraudulent Medical Malpractice, along with (4) Personal Injuries resulting from the first three.

Appellees chose to demur only against the medical malpractice issue on the ground of untimely filing. They could not use this on the Breach of Contract issue since it was abundantly clear that the Complaint was filed well within the four year bar of California CCP 337, supra. They could demur only by attempting a fraud on the court by implying that the agreement was not a contract!

Yet, Judge Butler chose to uphold the demurrer against the Breach of Contract issue by stating, incorectly:

> "And the medical malpractice sounds in tort, it does not sound in breach of contract, and no contract cause of action can be stated in connection with this." Reporter's Transcript p. 1 lines 23-25.

Thus, Judge Butler chose to obfuscate the issues by co-mingling two separate causes of action that made no sense. Even Appellants' protestations that they had a valid contract in Appellees' own handwriting fell on deaf ears and was ignored by Judge Butler. An action against a doctor sounds in tort, not in contract, only in the usual doctor-patient relationship. This was not such. Appellants were clients for an opinion only. Treatment was ruled out by mutual agreement and by "an instument in writing"--the appellees' own handwriting.

As stated in Appellees' Points And Authorities, C.T. 81:

> "In Depenbrok v. Kaiser Foundation Health Plan, 79 Cal.Rptr. 724, 726, ...the court stated:

> "' If a plaintiff can prove to a properly instructed jury that a surgeon has clearly promised a particular result (as distinguished from a mere generalized statement that the result will be good), and that the patient consented to an operation or other procedure in reliance on that promise, there can be recovery on the theory of warranty (or, to give the theory its more accurate name, breach of contract (emphases added)).'"

To clarify the situation, neither appellant was a patient of the appellees during the performance of the contract--only clients for an opinion in the pending court case. This is thus a commercial contract outside the normal doctor-patient relationship, promising two specific results, supra. Appellant, Rodger did show that the Appellees' opinion, "at least once a week," set no limit and was thus non-responsive to the contractual understanding.

Diagnosis is "treatment." Prescription after the issuance of the evaluation letter is "ongoing." The contract was

breached with resultant grave damages to both appellants. And it was breached within the four year bar of the statute of limitations on a written instrument.

Appellant, Rodger never asked, nor hinted, that the Court construe the agreement as,

> "...a contract somehow binding Sambs to forever forego treating and prescribing medications or care for his daughter Elise,..." App. B, infra.

Appellant, Rodger knew full well that he couldn't bind his minor daughter beyond majority. Yet, it is equally true that Appellees are forever bound not to treat until authorized. The mutually understood intent of the Appellees' hand-written insertions was to remove the "authorization to treat" and limit the authorization to "diagnostic evaluation" --not,

> "...evaluation and (emphasis added) diagnosis..." App. B, infra.

There is a difference. And it changes

the meaning of the Contract to reword it as the Appellate Court did. A decision based upon mis-statement of the case, which when properly stated would lead to the opposite decision, must be reversed.

To say that the only contractual relationship is Rodger's agreement to pay only those charges for Sambs' services limited to "evaluation and diagnosis" (quotes enclose mis-statement of fact, supra), ignores the function of a contractual agreement, i.e., definition of what is and is not to be done. Just as Appellees' would be liable for damages if they proceeded without a "Consent Form," they are just as liable when the "Non-Consent Form" precluded those same actions.

Thus, we see that there was a contract in accordance with Depenbrok v. Kaiser, supra and it was breached with the Complaint having been filed within

the four year bar of the statute of limitations, California CCP § 312, supra. The Contract was signed June 1, 1977; the initial Complaint was filed April 3, 1981, well within the four year bar.

Therefore, this Court need go no further.

> "Where trial court erroneously sustained a demurrer to a complaint on a certain specified ground, the order sustaining the demurrer will be reversed, although the complaint was open to demurrer in a particular to which attention was not called, either in the trial court or the appellate court. Morgan v. Asher (1920) 193 P. 288, 49 C.A. 172."

Although this alone is sufficient ground for reversal, there were numerous other errors of interpretation of fact and applicable law in the courts below. Therefore, in the event that this Court should, for reasons unknown to Appellants, rule that the previous error by the courts below is insufficient for reversal, the presentation of the case will continue in order for this Court to appreciate

the magnitude of the miscarriage of justice in the courts below and the unconstitutional nature of existing California law along with its judicial application re psychiatric medical malpractice.

The Appellate Court's statement:

> "All treatment was agreed to by by Rodger," App. B,

ignores the strenuous efforts by Appellant, Rodger to make it abundantly clear to all that he would not sign the "Consent Form" until "treatment" was precluded. Also, it was plainly stated that when the mother called to urge medication, Rodger stated:

> "She's doing very well without it." C.T. 13, 14.

Rodger did not request the prescription, the mother did. Realizing that this was a ploy on the part of the mother to retain custody, with the support

and perhaps even the instigation of Appellees since this was the purpose of the mother in retaining their services, Rodger, under duress, was forced to go along with the medication. Appellees knew that Elise had refused Stelazine from her previous doctor, who had urged Rodger to obtain custody for Elise's best interest. If Rodger went along with Elise's refusal, then the mother could show failure to properly care for the daughter by ignoring "doctor's orders." Rodger took Elise in to see Appellees, at their request, only to demonstrate that Elise truly objected. He had no idea that a licensed medical practitioner would incarcerate anyone for simply refusing unneeded and unwanted medication. This was before any "treatment" while Appellees were still bound by their Contract to engage in no

"...ongoing psychotherapy..." C.T. 48

Judge Butler's statement:

> "...It's clear from the pleadings as I read them that you were aware that the alleged malpractice occurred in the years immediately following the first consultation in April of 1977. It's clear that everything was over with by 1979; this Complaint was filed well after that particular time." App. C, infra,

ignores any showing of discovery of the malpractice. It merely sets the beginning and the end of contact between Appellants and Appellees.

Since the Complaint was filed well within the three year bar of the end of treatment, the only issue appeared to be date of discovery. From the trial court Reporter's Transcript, App. C, infra, we have:

> "MR. FINVOLD: I would like to ask your Honor on what basis the discovery was made prior to April 8, 1980?
>
> "THE COURT: The Complaint pleads the last treatment was in 1979 (typographical error corrected by Plaintiffs' amendment to "1978," having no bearing on the question.).

It pleads and attaches documentation with respect to acts that occurred in 1977.

"MR. FINVOLD: This was not discovery, your Honor, it was concealed until after April 8, 1980.

"THE COURT: Not on the face of the Complaint, as I read it, Mr. Finvold.

"Your Complaint is barred, as I understand it."

Thus we see that Judge Butler did not arrive at his judgment in accordance with prior judicial opinion and precedent as quoted in Appellees' Points and Authorities, C.T. 73:

> "Generally, material facts alleged in a complaint are treated as true for ruling on a demurrer. Gruenberg v. Aetna Insurance Company, 9 Cal.3d 556 (sic) (correctly, 566), 575 (1973). Also taken as true are facts that may be implied or inferred from those expressly alleged. Harvey v. Holtville, 271 Cal.App.2d 816 (1969). However, contentions, deductions, or conclusions of fact or law alleged in the complaint are not considered in judging its sufficiency. Gruenberg v. Aetna Insurance Company, supra. Further, allegations that are contradicted by facts of which the court may take judicial notice may be disregarded. Stoney Creek Orchards v. State, 12 Cal. App.3d 903 (1970)."

Thus, we see that facts must be

presented in order to lawfully contradict a plaintiff's allegation. None were presented. All we have is Appellees' contention and support of that contention as found in the trial court hearing and affirmed by the Appellate Court, App. C:

> "MR. REYNOLDS: ...facts pleaded in the Complaint show what (sic) the law requires to start the one-year period running long before she left Dr. Sambs' care, and--
>
> "THE COURT: As I read the Complaint, that's exactly right. The Complaint pleads clearly and unequivocally the time of discovery, which is well beyond the one-year period within which the Complaint should have been filed."

Thus, we see that no facts of discovery were ever presented by Appellees/Defendants or the trial court; no time or circumstances except vague references to "sometime during treatment."

Similarly, in the Appellate Court, statements such as,

> "The showing of an excuse for a late filing must be made in the complaint in factual terms, App. B,

ignores the fact that paragraphs XVII through XX of Appellants' First Amended Complaint, C.T. 16-19, details the efforts made by Appellant, Rodger, to determine the malpractice and eventual discovery that she was suffering from a phobic rection--one of the simplest and most common of mental aberrations--which Appellees had used to induce a violent rection in Appellant, Elise. There was no factual prior discovery shown or recognized by the Appellate Court.

Therefore, we see that the decisions were not based upon facts as defined by Black's Law Dictionary, which was quoted in Appellants' Opening Brief to the Appellate Court. In actuality the contentions on which the judgment was made comply precisely with what Black's Law Dictionary define as what fact is "not."

The only rationale in support of the decision is contained in the phraseology of the law, California CCP § 340.5,

supra,

"should have discovered."

When the qualifier,

"by reasonable diligence,"

is ignored, as it has been in this case, since Appellants displayed more than reasonable diligence, then the phrase becomes so vague yet all inclusive that it allows a judge to base judgment, not on fact but, rather on contention and his perception the reality of the word, "should." Both of these may be far removed from any factual basis on which a decision should be based but can be justified as complying with the letter of "should have discovered" phrase.

Thus, we see that California CCP § 340.5 is repugnant to the Constitution of The United States in that it illegally disfranchises Appellants, and others, of their Constitutionally preserved civil "right to trial by jury."

Note particularly that Judge Butler's statement:

"Your Complaint is barred," was made with no consideration of the False Imprisonment cause of action.

With respect to the False Imprisonment cause of action, it should be clearly noted that for at least six months prior to the day on which Appellees breachd their contract with Apellants by illegally prescribing unneeded and unwanted medication for Appellant, Elise, insisting to the point of exasperation that Elise take the medication, and falsely imprisoning Elise for not taking Appellees' prescription, that Appellant, Elise, was in near perfect health, both mentally and physically. There was no complaint to the Appellees from anyone concerning her behavior, not from her paternal aunt, with whom Elise had been living the previous six months,

not from her father or her brother with whom she had been living the past several weeks, not from the maternal aunt who had recommended Appellees to the mother, nor from the mother. The only action by anyone, other than Appellees, was the mother noting a statement that Appellees had included in their evaluation letter for the pending court hearing, in Breach of Contract, that Elise should be on a maintenance dosage of Stelazine. The details of the bizarre happenings that day are included in the court record, C.T. 31-34, ending in her incarceration behind locked doors for doing nothing except refusing to take the Appellees' illegally prescribed medication which she did <u>not</u> need. In fact, from her violent reaction, in contrast to her normal easy-going, co-operative self, it was contra-indicated, which Appellees, through either incompetence or fraud,

could not or would not recognize.

Note also that the False Imprisonment was more in the nature of Kidnapping in that ransom in the guise of doctor's fees and hospital charges were extracted from Elise's father in order to gain her freedom.

Quoting from 22 Cal Jur 2d, we have the following:

> "Since statehood, the courts have without deviation asserted the simplicity of the elements necessary to constitute or give rise to an action for false imprisonment. All that is necessary to make out the charge is that the individual be restrained of his liberty without sufficient complaint or authority. The primary right involved is the liberty of the citizen--the right of freedom of locomotion, or the right to come and go or stay when or where one may choose.
>
> "' From time immemorial the most conspicuous feature of history has been the struggle between liberty and authority. Today, as in ages past, the courts are not without tragic proof that the...power of some governments to ignore the inalienable right of the individual to liberty and to resort to lawless enforcement of the law is the handmaid of tyranny. No more solemn responsibility rests on the courts

> than to maintain the constitutional and statutory shields planned and enscribed to preserve liberty under law and to protect each individual from oppression and wrong, from whatever source it may emanate.' Ware v. Dunn 80 CA 2d 936, 183 P2d 128.
>
> "The essential thing is the restraint of the person by means that are unlawful or without authority, and not whether the plaintiff suffered bodily harm. ..."

Now comes the question of the application of "fraud" to the instant case.

Breach of Contract, by its very nature is usually fraudulent, though misunderstandings of intent can occur. However, in the instant case, there was no such misunderstanding on the part of the appellees. The words of the Contract are inscribed in Appellees' own handwriting. It was clearly understood by Appellees that Appellant, Rodger Finvold, would not consent to allow Appellees to conduct their procedures on his daughter for the mother's desired opinion unless they agreed not to use

those procedures as an instrument to take over the treatment of his daughter.

Medical Malpractice may or may not be fraudulent dependent upon intent and whether or not it was due to ignorance or negligence. The performance of an unnecessary operation is fraudulent. The prescription of penicillin to one allergic to penicillin, without adequate precautions, is fraudulent. Prescribing unnecessary medication, especially when prohibited by contract, is fraudulent. Concealment is fraudulent.

When called out in the title of the Complaint as "Fraudulent Medical Malpractice" it is prima faecie "fraudulent" unless there are facts to the contrary of which the Court may take judicial notice. Again, it should be noted that allegations of plaintiff are to be accepted as true unless there are facts to the contrary of which the

Court may take judicial notice. The trial is the time and place for the determination of the truth or falsity of the allegations, not in a hearing on a demurrer, unless obvious and without question.

However, the discovery of the malpractice in the instant case was delayed by the fraudulent concealment by the appellees, as by the apellees assertion:

> "When you've had as much training, experience, and knowledge as I have, then you may question my judgment."

Clearly, this was intended to cause Appellants to mistrust their own judgment with respect to any criticism or thought of litigation. Thus, the concealment is fraudulent in the instant case.

The concealment was brought out in the Appellate Court at calendar in rebuttal to Appellees' counsel's assertion that the Finvolds just didn't

understand California law in that it requires discovery during treatment, paraphrasing to the best of our knowledge since a transcript is not available to Appellants from the Court. Appellants responded that this is not true when the malpractice is concealed by the doctor.

However, this fact was not considered in the Appellate Court's decision.

Similarly, for the False Imprisonment cause of action. Never did Appellees come forth and state that they had falsely imprisoned Elise. On the contrary, Appellees' statement:

> "You'd better get her into a hospital,"

coming from a licensed medical practitioner, has the ring of truth and authority to it that a father had better well comply or be accused of negligence and irresponsibility, which, Appellees were attempting to accomplish by their prescription of Stelazine, in order to

serve the mother who had procured their services, knowing full well that Elise had refused to take it any longer from her previous doctor.

If Appellees could provide the mother with evidence that the father was negligent in the care of their daughter, the mother would thus have an argument to retain custody of the daughter--by means of the fraudulent actions of the appellees--(1) by prescribing unneeded medication and (2) in violation (breach) of contract.

Thus, we see that the statute of limitations had not run out on the False Imprisonment cause of action. The falsity of the incarceration could not be discovered until the cause of the upset in Appellees' office was determined, namely, that she had a phobia against Stelazine. This was not, and could not have, been discovered until subsequent to April 8, 1980. No authority came

forward until mid April 1980 to state, as Dr. Barbee did then,

> "I think that Stelazine she has been taking is doing her more harm than good."

Furthermore, Appellees knew this and were using it to assist the mother in maintaining custody of the daughter--or at least prevent the father from obtaining custody, which Appellees accomplished at the end of 1978 by having Elise discharged to the home of the maternal aunt.

Per the Code Commissioner's Notes to California CCP § 312, supra, we find,

> "...in all cases a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the Statute of Limitations. By the system of practice in this State there is no replication to the answer. The fraudulent concealment cannot, therefore, be replied to by pleading, but it may be established by proof on the trial, and will then just as effectually avoid the plea of the statute." Kane vs. Cook, 8 Cal., p. 449.

This fact should have been consid-

ered by the courts below. The False Imprisonment rests on the same causative factors as the Fraudulent Medical Malpractice and Breach of Contract, both of which are fraudulent and the delay in discovery of all three is by fraudulent concealment, as in the rebuttal to Counsel for Appellees at calendar.

Thus, we see that fraudulent concealment cannot be replied to by pleading, the demurrer should have been denied forthwith by the Appellate Court and the sustaining of the demurrer by the trial court should have been reversedby the Appellate Court or, at the very least, if there were technical defects in the pleadings sufficient to preclude outright reversal, Appellants should have been allowed leave to amend.

THE QUESTIONS ARE SUBSTANTIAL

1. Should psychiatric clients and patients continue to be deprived of redress accorded other medical patients by the difficulty of proving belated discovery via California CCP § 340.5 phraseology, "should have discovered," allowing "suspicion" and "awareness that something was amiss" to be "discovery?" This thus deprives a large segment of the citizenry of the Constitutional Seventh Amendment preserved civil "right to trial by jury" alongwith the Fourteenth Amendment guarantees of freedom and liberty.

2. Should courts be allowed to mis-state facts and then rule on the mis-stated facts to the detriment of plaintiffs/appellants without the right of correction by review or appeal?

3. Should any State be allowed to make and enforce laws abridging the privileges of its citizens?

CONCLUSIONS

The inescapable conclusions from the foregoing presentation is that, (1) The Appellants' Constitutionally preserved Seventh Amendment civil "right to trial by jury" has been denied and (2) Appellants' Fourteenth amendment right to "life, liberty and property" has similarly been abridged via the laws, and interpretation of the laws, in the State of California by the following:

1. The wording of California CCP § 340.5 being repugnant to the Constitution of The United States in that the phrase, "should have discovered" is so vague yet all inclusive that Appellants' (and others') Seventh Amendment Constitutionally preserved civil "right to trial by jury" has been denied by allowing the courts to assume Appellants had "knowledge" that even the appellees had clearly stated the appellants did not possess.

2. Both the trial court and the Appellate Court did not understand or realize that the Contract was outside the normal doctor-patient relationship and thus sounded in contract, not in tort. Furthermore, the Appellate Court distorted the meaning of the contract in sharp contrast to the wording and understanding of the parties at the time of its making to the detriment of Appellants.

3. When the Contract is correctly interpreted, in terms of the wording and the understanding of the parties involved at the time of its making, and not the mis-construction of the Appellate Court, there was a valid contract, the Contract was breached with serious damages, and Appellants successfully avoided the bar of the statute of limitations.

3. Since both the trial court and the Appellate Court erred in sustain-

ing the demurrer on the preceding cause of action, the judgment, opinion and order of the courts below must be reversed.

4. No discovery date or facts were provided by the appellees or the courts below to contradict Appellants' time and circumstances--only vague contentions implying that discovery should have occurred sometime before the end of treatment. Since no facts were presented to contradict Appellants' allegations, as a matter of law, the demurrer should be denied on any relevant cause of action requiring discovery--both Malpractice and False Imprisonment.

Thus, the overwhelming facts and logic lead to the inescapable conclusion that the demurrer on the instant case must be denied and the opinion of the Appellate Court must be reversed for

numerous judicial errors..

Also the order should be reversed in that California CCP § 340.5, "should have discovered" is repugnant to the Seventh and Fourteenth Amendments to the Constitution in that Appellants', and others', constitutionally preserved "right to trial by jury" is precluded and is contrary to the admonition,

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;..." United States Constitution, Fourteenth Amendment, Section 1, supra.

Respectfully submitted,

Rodger C. Finvold*
13303 Portofino Drive
Del Mar, California 92014
(619) 481-7217

Elise R. Finvold
No. 27
4747 Marina Drive
Carlsbad, California 92008

*Counsel of Record
in pro per

December 27, 1983

APPENDICES

APPENDIX A

DENIAL OF PETITION FOR HEARING

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

JUN 15 1983

I have this day filed Order

HEARING DENIED

In re: 4 Civ. No. 26524

RODGER C. FINVOLD & ELISE R. FINVOLD

vs.

JAMES M. SAMBS, et al.

Respectfully,

Clerk

APPENDIX A

DENIAL OF PETITION FOR HEARING
ON CONSTITUTIONAL GROUNDS

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 5 1983

I have this day filed Order

HEARING DENIED

In re: 4 Civ. No. 26524

RODGER C. FINVOLD & ELISE R. FINVOLD

vs.

JAMES M. SAMBS, et al.

Respectfully,

Clerk

APPENDIX B

OPINION OF APPELLATE COURT
ON APPEAL FROM TRIAL COURT

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

COURT OF APPEAL
4TH DISTRICT DIV.1
FILED MAR 24 1983 11:40A
KEENAN G. CASADY, CLERK

RODGER FINVOLD, et al., Plaintiffs and Appellants, v. JAMES M. SAMBS, et al., Defendants and Respondents.	4 Civ. No. 26524 (Super. Ct. No. 468190)

APPEAL from a judgment of the Superior Court of San Diego County, Edward T. Butler, Judge. Affirmed.

Rodger Finvold and his daughter Elise Finvold appeal a judgment of dismissal entered after an order sustaining Dr. James Sambs' demurrer to their first amended complaint without leave to amend. Neither party has suggested any proper amendment, nor have they asked leave to try. The trial court did not abuse its discretion.

Factual Background

Rodger Finvold and his daughter Elise individually claim damages from a psychiatrist, James M. Sambs, arising from his professional services beginning approximately June 1, 1977, in which Rodger authorized the doctor to evaluate Elise's psychiatric condition and give a diagnostic opinion to be used in pending child custody proceedings involving Rodger and his estranged wife. The authorization contains a plain disclaimer of any

warranty or guaranty as to results. It also expressly limited the scope of authorization to the evaluative and diagnostic purposes relating to the court proceeding. Rodger agreed to pay for the services authorized. At Rodger's insistence, Sambs amended the printed authorization form to specify "this authorization does not include on-going psychotherapy other than the professional contacts re: the dx evaluation for the pending court hearing." Sambs completed his diagnosis and evaluation pursuant to the authorization and reported his findings by letter dated July 13, 1977.

APPELLATE REVIEW

"[A] general demurrer admits the truth of all material factual allegations in the complaint ...." (Alcorn v. Anbro Engineering, Inc., 2 Cal.3d 493, 496.) Whether plaintiff can prove these

allegations is not of our concern; for, "plaintiff need only plead facts showing that he may be entitled to some relief." (Ibid.) The allegations are to be liberally construed with a view to obtaining substantial justice between the parties. (King v. Central Bank, 18 Cal.3d 840, 843.) "A general demurrer may be sustained without leave to amend where it is probable from the nature of the complaint and the previous unsuccessful attempt to plead that the plaintiff cannot state a cause of action[, and t]o do so does not constitute an abuse of discretion." (Kingsbury v. Tevco, Inc., 79 Cal.App.3d 314.)

THE FATHER'S CAUSES OF ACTION

Contract:

Rodger's complaint claims this authorization "contract" was breached in two manners. First, he alleges Sambs did

not respond in a responsible manner to the only two questions before the court, namely: "(1) Should the physical custody of plaintiff, Elise Finvold, be changed from the mother to the father and (2) If so, what limitations should be placed on the visitation rights of the mother." His complaint does not allege damages flowed from this purported breach, nor does he show any contractual promise made by Sambs which these conclusory statements purport to show have been violated. Second, Rodger alleges Sambs "breached said limitations in said contract by proceeding to diagnose or, more precisely, misdiagnose the mental condition of plaintiff, Elise Finvold, in a careless and incompetent manner for fraudulent purposes, prescribed unneeded medication, falsely imprisoned plaintiff, Elise Finvold ...." These allegations do not sound in contract

but in the torts of negligence and false imprisonment, both of which are private to the daughter, Elise. (See e.g., Sea World, Inc. v. Superior Court, 13 Cal.App.3d 100, 106.)

Although Rodger would have us construe the June 1, 1977 authorization as a contract somehow binding Sambs to forever forego treating and prescribing medications or care for his daughter Elise, the authorization, as a matter of law, is not susceptible to that interpretation. The only contractual relationship established in that document is Rodger's agreement to pay only those charges for Sambs' services limited to evaluation and diagnosis for the custody proceedings.

In a lengthy case history incorporated into the complaint, plaintiffs state the chronology relating to Elise's

treatment by Sambs. All treatment was agreed to by Rodger, including the giving of medications and hospitalizations. The treatment and/or care of which Rodger now complains terminated in November 1979, and was different and apart from the matters referred to in the June 1, 1977, authorization. During this additional professional relationship, both Rodger and Elise's mother were in constant communication with Sambs and could have terminated the relationship at any time. (Rodger's claim of being afraid to disrupt the Sambs-Elise professional relationship, because it might impair his custody chances, is irrelevant to the issues here.)[1]

Therefore, there are insufficient facts stated in the complaint to allege a breach of contract action.

Negligence:

Although Rodger has not articulated it, his complaint can be construed as alleging Sambs' actions negligently inflicted emotional distress upon him. The statue of limitations for this tort is one year. (§, subd. (3).)[2] There is no "discovery" exception. Rodger alleges his "mental stress, agony, displeasure, pain and suffering" commenced in July 1977 and the last possible act attributable to Sambs was in November of 1977. Stretching it as far as we can, the statute of limitations expired in November of 1980, months before filing of the present

---

[1]At calendar, the father suggested a breach of warranty action may be founded upon the written authorization. However, that agreement contains no guarantee of result and cannot support that cause of action.

[2]All statutory references are to the Code of Civil Procedure unless otherwise specified.

complaint. This cause of action is also time-barred.

THE DAUGHTER'S CAUSES OF ACTION

Professional Negligence:

Elise's medical malpractice action is barred by the statute of limitations in section 340.5:

> "[T]he time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first."

The meaning of the word "injury" as used in the statute is distinguished from "wrongful act." In a suit for malpractice the statute of limitations commences to run when plaintiff discovers the injury and its negligent cause or through the exercise of reasonable diligence should have discovered it. (Sanchez v. South Hoover Hospital, 18 Cal.3d 93.)

The showing of an excuse for a late filing must be made in the complaint in factual terms. Mere conclusions or formal averments, no matter how stridently stated or emphasized, are useless. The allegations must specify the facts of the time and manner of discovery and the circumstances excusing failure to make earlier discovery. (Anderson v. Brouwer, 99 Cal.App.3d 176, 182.) Plaintiffs must allege facts showing earlier discovery was not possible in spite of their reasonable diligence. Mere conclusory assertions the delay was reasonable will not withstand a general demurrer. (Saliter v. Pierce Brothers Mortuaries, 81 Cal.App.3d 292, 297.)

Personal injury cases based upon negligent breach of contract are governed by the one-year statute of limitations prescribed by section 340, subdivision

(3). (Allred v. Bekins Wide World Van Services, 45 Cal.App.3d 984, 988.)

Plaintiffs assert that, although the alleged misdiagnosis occurred in 1977, neither Rodger nor Elise discovered Elise's aberrant behavior and resulting hospitalizations were due to the misdiagnosis and stelazine prescribed by Sambs until April 1980, 15 months after the termination of the professional relationship. They set forth no facts excusing the delay in discovery.

Possession of "presumptive" as well as "actual" knowledge triggers the statute (Sanchez v. South Hoover Hospital, supra, 18 Cal.3d 93) and when a person has notice of circumstances to put a reasonable person on inquiry, the statute commences to run.

Elise became an adult August 24, 1979. She alleges she "opposed the

malpractice ... by the only means available to her -- running away, but every time she attempted this she was incarcerated." The plain purpose of this admission is Elise's recognition of Sambs' malpractice during the time she was running away. Her numerous runaway episodes and escapes from hospitalization occurred at the time she was under Sambs' care and before November 1979. Without facts permitting tolling the statute of limitations, it ran continuously at least from November 1979 and expired one year later.

False Imprisonment:

The cause of action for false imprisonment accrues when the plaintiff is released from the illegal restraint. It is not postponed until the illegality of the arrest is discovered. (Collins v. County of Los Angeles, 241 Cal.App.2d 451,

457.) Thus, an action must be filed within one year of the confinement. (§340.) Elise charges the false imprisonment occurred before the end of the doctor-patient relationship in 1978. Although the alleged imprisonment occurred during plaintiff's minority and such disability tolls the commencement of the accrual period (§ 352, subd. (a)1) it commenced running when she became an adult in August 1979. Thus, the cause of action is time-barred on the face of the complaint in the absence of any factual allegations which would purport to legally justify an extension.

Judgment affirmed.

WORK, J.

WE CONCUR:

BROWN, P.J.,

COLOGNE, J.

APPENDIX C

REPORTER'S TRANSCRIPT OF
SUPERIOR COURT HEARING ON
DEFENDANT'S/APPELLANT'S DEMURRER

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

DEPARTMENT NO. 12

BEFORE HON. EDWARD T. BUTLER, JUDGE

RODGER FINVOLD, etc., Plaintiffs, vs. JAMES M. SAMBS, M.D., Inc., et al., Defendants.	No. 468190

REPORTER'S TRANSCRIPT

Proceedings of October 28, 1981

APPEARANCES:

For Plaintiffs: RODGER C. FINVOLD,
in Propria Persona
13303 Portofino Drive
Del Mar, CA 92014

ELISE R. FINVOLD,
in Propria Persona
4508 Hill Street
San Diego, CA 92107

For Defendant: AULT, MIDLAM & REYNOLDS
BY: DOUGLAS R. REYNOLDS
5030 Camino de la
Siesta, Suite 201
San Diego, CA 92108

C O P Y GEORGE TURLEY, C.S.R 847

SAN DIEGO, CALIFORNIA, WEDNESDAY,
OCTOBER 28, 1981, 11:14 A.M.

THE CLERK: Item 13, Finvold v. James Sambs, M.D.

MR. REYNOLDS: Your Honor, Douglas Reynolds for the Defendant, Dr. Sambs.

MR. FINVOLD: Rodger Finvold, plaintiff in pro per.

MS. FINVOLD: Elise Finvold, plaintiff in pro per.

MR. REYNOLDS: Your Honor, in view of

the Court's tentative ruling, I would only reserve some time to respond. I would remind the Court that this is an Amended Complaint that we are dealing with on the demurrer; they were given an opportunity to amend following the first sustaining of the demurrer.

THE COURT: Thank you.

MR. FINVOLD: Your Honor, plaintiffs would like to ask your Honor the basis for the tentative ruling.

THE COURT: Well, the Complaint is barred by the statute of limitations, CCP Section 340.5. It's clear from the pleadings as I read them that you were aware that the alleged medical malpractice occurred in the years immediately following the first consultation in April of 1977. It's clear that everything was over with by 1979; this Complaint was filed well after that particular time.

And the medical malpractice sounds in tort, it does not sound in breach of contract, and no contract cause of action can be stated in connection with this.

MR. FINVOLD: Well, your Honor, first off, the cause of action doesn't accrue until at least the end of treatment, and it doesn't accrue until appreciable damages have been sustained, and it doesn't accrue until discovery is made. And it must be filed within one year of discovery, and we have complied with all of the requirements of the law with regard to timely filing.

Now, what was your second point?

THE COURT: What's that?

MR. FINVOLD: What was the second point?

THE COURT: It doesn't sound in contract, it sounds in tort.

MR. FINVOLD: Okay. There was an

agreement between myself and Dr. Sambs with my daughter, Elise Finvold, as a third-party beneficiary, in which the Doctor promised to provide a diagnostic opinion for the Court, and to engage in no ongoing psychotherapy, that is, no treatment of my daughter. He violated both of those agreements; and these were written agreements with the Doctor, in his own handwriting. Under those circumstances, it does sound in contract. The Courts have held that if there is a specific promise of a specific result, that it is a contract with the Doctor.

Now, your third point was now, again -- your third point again?

THE COURT: I think those were the two points.

MR. FINVOLD: Okay. Under those circumstances, it appears that there is a misunderstanding, and that the Complaint

should be sustained. The discovery of the injury was not made until subsequent to April 8, 1980, and the Complaint was filed on April 3, 1981, and we have complied with both the three-year statute of limitations and the one-year discovery.

THE COURT: Do you have anything more, Mr. Finvold?

MR. FINVOLD: Not at the moment.

THE COURT: Mr. Reynolds?

MR. REYNOLDS: Your Honor, the only thing I would say is that the facts pleaded in the Complaint show what the law requires to start the one-year period running long before she left Dr. Sambs's care, and --

THE COURT: As I read the Complaint, that's exactly right. The Complaint pleads clearly and unequivocally the time of discovery, which is well beyond the one-year period within which the Complaint

should have been filed.

And I must, Mr. Finvold, sustain the demurrer without leave to amend.

Would you prepare the necessary order?

MR. REYNOLDS: I will, your Honor, thank you.

MR. FINVOLD: Your Honor, could I respond to that?

THE COURT: Well, I thought you had.

MR. FINVOLD: I would like to ask your Honor on what basis the discovery was made prior to April 8, 1980?

THE COURT: The Complaint pleads the last treatment was in 1979. It pleads and attaches documentation with respect to acts that occurred in 1977.

MR. FINVOLD: This was not discovery, your Honor, it was concealed until after April 8, 1981.

THE COURT: Not on the face of the

Complaint, as I read it, Mr. Finvold.

Your Complaint is barred, as I understand it.

MR. FINVOLD: Your Honor, plaintiffs move to appeal the ruling.

THE COURT: You are, of course, entitled to take whatever recourse you may choose to pursue following your receipt of the order sustaining the demurrer without leave to amend.

MR. FINVOLD: Thank you, your Honor.

THE COURT: Thank you.

MR. REYNOLDS: Thank you, your Honor.

THE CLERK: Notice waived?

MR. REYNOLDS: I will give notice, your Honor.

THE COURT: Thank you. We are in recess.

(Conclusion of proceedings in the Finvold matter, and recess, 11:21 a.m.)

- - -

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

I, GEORGE TURLEY, an official reporter of the Superior Court of California, for San Diego County, hereby certify that the foregoing pages, numbered 1 through 4, comprise the full, true, and correct transcript of my Stenograph notes of proceedings in Department 12 on October 28, 1981, in the matter of Finvold v. Sambs, No. 468190.

DATED at San Diego, California, this 5th day of November, 1981.

GEORGE TURLEY, CSR 847

APPENDIX D

ORDER OF TRIAL COURT
SUSTAINING DEMURRER

AULT, MIDLAM AND REYNOLDS
ATTORNEYS AT LAW
5030 Camino de la Siesta,
Suite 201
San Diego, California 92108
(714) 295-1202

Attorneys for Defendant

FILED NOVEMBER 10 1981

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

RODGER FINVOLD and ELISE FINVOLD,	NO. 468190
Plaintiffs,	ORDER SUSTAINING GENERAL DEMURRER TO FIRST AMENDED
v.	COMPLAINT WITHOUT LEAVE TO AMEND AND
JAMES M. SAMBS, M.D., INC., et al.,	DISMISSING DEFENDANT FROM ACTION
Defendants.	

The general demurrer of defendant, JAMES M. SAMBS, M.D., INC., came on regularly for hearing on October 28, 1981, at 10:00 a.m. in Department 12 of the above-entitled Court, the Honorable Edward T. Butler, Judge Presiding. Plaintiffs RODGER FINVOLD and ELISE R. FINVOLD, In Pro Per, appeared personally, and moving defendant, JAMES M. SAMBS, M.D., INC., appeared through his counsel of record, DOUGLAS R. REYNOLDS of AULT, MIDLAM, AND REYNOLDS. The Court having considered the moving papers and opposition thereto, and the matter having been argued and submitted to the Court,

IT IS HEREBY ORDERED that the demurrer of defendant JAMES M. SAMBS, M.D., INC. is hereby sustained without leave to amend; and accordingly,

IT IS HEREBY FURTHER ORDERED that plaintiffs' First Amended Complaint is

hereby dismissed as against defendant JAMES M. SAMBS, M.D., INC.

DATED NOVEMBER 10, 1981

EDWARD T. BUTLER,
Judge of the Superior Court

APPENDIX E

DENIAL OF APPELLATE COURT
FOR REHEARING TO CLARIFY
MISUNDERSTANDINGS

COURT OF APPEAL-STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

FILED APRIL 11, 1983
KEENAN G. CASADY,
Clerk

RODGER FINVOLD, ET AL., Appellants, vs. JAMES M. SAMBS, ET AL., Respondents.	4 Civil No. 26524 SUPERIOR COURT NO. 468190

THE COURT:

The petition for rehearing is denied.

BROWN
Presiding Justice

Copies to: Mr. Rodger C. Finvold
Ms. Elsie (sic) Finvold
Mr. Douglas R. Reynolds
Superior Court, SD

APPENDIX F

APPELLATE COURT DENIAL OF PETITION FOR RECONSIDERATION HEARING ON CONSTITUTIONAL ISSUES

COURT OF APPEAL-STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

FILED AUGUST 16, 1983
KEENAN G. CASADY, Clerk

RODGER FINVOLD, ET AL.,	
Plaintiffs-Appellants,	4 Civil No. 26524
vs.	
JAMES M. SAMBS, ET AL.	SUPERIOR COURT NO. 468190
Defendants-Respondents.	

THE COURT:

The motion for recall of remittur and petition for reconsideration hearing on constitutional issues are denied.

BROWN
Presiding Judge

Copies to: Mr. Rodger Finvold
Ms. Elsie (sic) Finvold
Mr. Douglas Reynolds
Superior Court, SD

APPENDIX G

NOTICE OF APPEAL

RECEIVED
December 29, 1983
Court of Appeal
Fourth Dist.
San Diego

Rodger C. Finvold
13303 Portofino Drive
Del Mar, California 92014
(619) 481-7217

Elise R. Finvold
No. 27
4747 Marina Drive
Carlsbad, Calfornia 92008
(619) 434-3276

Appellants in pro per

CALIFORNIA FOURTH APPELATE DISTRICT COURT,
DIVISION ONE

RODGER FINVOLD and ELISE FINVOLD, Appellants v. DR. JAMES M. SAMBS: JAMES M. SAMBS, M.D., INC.;	4 Civ. No. 26524 (Super. Ct. No. 468190) NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

DOES I THROUGH X,)
)
Inclusive)
)
Appellees)
)

May it please the Court to note that Rodger C. Finvold and Elise R. Finvold, supra, appeal the judgement of California Fourth Appellate District Court, Division One on the above identified case of, "Affirmed," filed March 24, 1983 and the California Supreme Court denial of Appellants' appeal for Rehearing On Constitutional Grounds dated October 5, 1983.

This appeal is taken under 28 U.S.C. § 1257(2) on the ground that California CCP § 340.5 is repugnant to The United States Constitution, Amendments VII and XIV.

Rodger C. Finvold Date

Elise R. Finvold Date

Appellants in pro per